

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

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UNITED STATES, et al., : Civil Action No.:  
 : 1:23-cv-108  
 :  
 : Plaintiffs, :  
 :  
 : versus : Friday, October 13, 2023  
 : Alexandria, Virginia  
 :  
 : GOOGLE LLC, :  
 :  
 : Pages 1-18  
 :  
 : Defendant. :  
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The above-entitled motion to disqualify counsel was heard before the Honorable Leonie M. Brinkema, United States District Judge. This proceeding commenced at 9:54 a.m.

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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

P R O C E E D I N G S

THE DEPUTY CLERK: Civil Action 23-108, United States of America versus Google LLC.

Would counsel please note their appearances for the record.

MR. MENE: Good morning, Your Honor. Gerard Mene with the U.S. Attorney's Office.

MS. WOOD: Good morning, Your Honor. Julia Wood from the Department of Justice.

MR. HENRY: Good morning, Your Honor. Ty Henry from the Virginia Attorney General's Office on behalf of the plaintiff states.

THE COURT: Good morning. There's so many lawyers on this case, I'm not going to say good morning as each lawyer introduces him or herself. All right.

How about for the third parties.

MR. MOLSTER: Good morning, Your Honor. Charles Molster for the non-party movants. With me at counsel table is Brandon Kressin. With the Court's permission, he'll handle the motion. He's admitted pro hac vice.

THE COURT: All right.

MR. MOLSTER: Thank you, Your Honor.

THE COURT: And he's going to -- you're going to handle it for both of the non-parties?

1 MR. KRESSIN: For both News/Media Alliance and --  
2 yeah.

3 THE COURT: All right. Mr. Kressin, good morning.  
4 And for Google.

5 MS. RUSSELL: Your Honor, Whitney Russell on  
6 behalf of Paul, Weiss. With me is Howard Shapiro and  
7 Bruce Berman. And Howard Shapiro will be arguing, with the  
8 Court's permission. He's admitted pro hac vice.

9 THE COURT: I'm sorry. Who will be arguing?

10 MS. RUSSELL: Howard Shapiro.

11 THE COURT: All right. Good morning.

12 MR. SHAPIRO: Good morning, Your Honor.

13 THE COURT: Actually, Google is technically not  
14 involved in this motion, nor really is the United States;  
15 right? None of the plaintiffs are involved. So we probably  
16 really should have you all switch tables.

17 All right. Mr. Kressin, this is your motion. And  
18 we've gone through the 3 inches or so of papers that you all  
19 submitted in supporting what is, in my view, a fairly  
20 straightforward motion, so I don't need to hear you repeat  
21 everything that's in the papers.

22 But what I'd like you to focus on is, explain to  
23 me what specific prejudice you believe could occur as to  
24 your two clients -- or the two people whom -- entities whom  
25 you represent, if the Court were not to grant your motion.

1 MR. KRESSIN: Yes, Your Honor. Thank you, Your  
2 Honor. I'll talk about both clients in turn and then issues  
3 that affect both of them.

4 First, for News/Media Alliance -- just as a  
5 reminder, that's a trade association that represents  
6 newspapers and digital publishers around the country -- this  
7 has been a very significant issue for them for the past  
8 decade now. One of the main ways that publishers monetize  
9 their content is through digital ads sold on their page  
10 through ad tech, such as that provided by Google.

11 THE COURT: Have they joined any of the multiple  
12 cases involving the ad tech issues?

13 MR. KRESSIN: Well, several of their members have,  
14 Your Honor. The News/Media Alliance itself, as a trade  
15 association, has not filed the lawsuit itself, but while at  
16 Paul, Weiss we engaged -- me and other Paul, Weiss attorneys  
17 engaged advocacy on behalf of the association and its  
18 members encouraging this very case to be brought.

19 And so the concrete detriment that they would  
20 suffer from Paul, Weiss's representations -- successful  
21 representation of Google in this case, is that they would  
22 continue to have to pay what they view as super competitive  
23 prices for ad tech services that they obtain from Google and  
24 the markets alleged by the DOJ.

25 Yelp is in a similar position but with some slight

1 differences. It's both a customer of ad tech, as well as a  
2 horizontal competitor against Google. They had to develop  
3 their own ad server. So they do not use Google's ad server,  
4 formerly known as DFP, now GAM, but they had to  
5 self-provide, in part, because the market had been  
6 monopolized by the DFP, which is a competitor to them.

7           They have also developed their own products in the  
8 ad tech intermediary space. For example, they partnered  
9 with DSPs beginning in 2021 to have a product called Yelp  
10 Audiences, which tries to retarget ads to Yelp consumers on  
11 the third-party sites. So they're both a customer that  
12 suffers from a monopolized ad tech market and a competitor  
13 who suffers from being excluded from the market or prevented  
14 from competing necessarily.

15           THE COURT: But, again, has Yelp joined any of the  
16 litigation involving this aspect of Google's --

17           MR. KRESSIN: Yelp has not filed suit, no.

18           THE COURT: All right. So, I mean, basically what  
19 you're saying is Yelp and the other entity could ultimately  
20 be affected by the outcome of this case?

21           MR. KRESSIN: I would say it's more than that,  
22 Your Honor.

23           Yelp and News/Media Alliance have encouraged DOJ  
24 to bring these cases and provided confidential information  
25 to the DOJ and state AGs regarding their arguments of why

1 they should bring this case.

2 THE COURT: All right. Let me ask now  
3 Mr. Shapiro.

4 As I understand it, discovery has closed except  
5 for experts; is that correct?

6 MR. SHAPIRO: Yes, Your Honor.

7 THE COURT: All right. So the universe of  
8 discovery that would be available to be used in this  
9 litigation is now created?

10 MR. SHAPIRO: That's correct, Your Honor.

11 THE COURT: In that universe, is there any  
12 information whatsoever, other than this White Paper, that  
13 has come from either of these two nonparties?

14 MR. SHAPIRO: Your Honor, Yelp did produce some  
15 documents. None of those documents relate to the request  
16 that they objected to as irrelevant that they cited in their  
17 papers as being substantially related to this matter.

18 THE COURT: Give me a more concrete example of  
19 what evidence you received from Yelp.

20 MR. SHAPIRO: They produced some general strategy  
21 papers, they produced -- I may need -- some general  
22 advertising strategy.

23 I would like to add, Your Honor -- because Your  
24 Honor put your finger on the issue -- they're not -- you  
25 know, to disqualify Paul, Weiss in this, they would have to

1 be in a position of claiming material adversity. And  
2 they're not only not -- a generalized economic interest in  
3 the outcome doesn't come close to that. They are so far on  
4 the periphery of this case, and going forward, they're not  
5 going to be in it at all. They're not -- as the Court  
6 noted, discovery has closed. They were never deposed.  
7 They're not on the government's initial disclosures list,  
8 they're not going to be called by Google. They are  
9 spectators to this matter.

10           There is no case, that we found at least, where a  
11 party as an entity -- not a party, obviously -- as remote  
12 from the matters at issue in a case has ever successfully  
13 brought a motion to disqualify counsel. They are very, very  
14 far from material adversity. And with no adversity, there,  
15 as the Court well knows, there could be no conflict. With  
16 no conflict, there could be no violation of the Virginia  
17 professional rules. And, without that, there is no basis  
18 for disqualification whatsoever.

19           THE COURT: All right. Now, let me ask you this,  
20 though, because this does sort of make me wonder why this  
21 happened this way.

22           This lawsuit was filed in January of this year,  
23 and we had thought, because of the way most of the motions  
24 were being presented, that Freshfields was the lead counsel  
25 for Google. Paul, Weiss, to my understanding, did not



1 notice its appearance in this litigation until May 6th of  
2 this year.

3 I find it rather unusual that the lead counsel,  
4 lead trial counsel, would not be on some of the original  
5 pleadings, such as the answer, and actually not appear  
6 officially in the case, so that, for example, these entities  
7 would know that Paul, Weiss was in the case until several  
8 months after the litigation had gotten started.

9 MR. SHAPIRO: My understanding, Your Honor --  
10 obviously from what I've learned from my clients here --  
11 when the Court denied the motion to transfer to -- as part  
12 of the MDL and admonished the parties that they should have  
13 their running shoes on because this was going to go very  
14 quickly -- as is the habit in this district, through the  
15 process and to trial, if a trial is going to be had -- at  
16 that point, Google, looking around, realizing that although  
17 they had very competent counsel in Mr. Mahr and his  
18 colleagues from Freshfields, they were also handling the MDL  
19 in New York, they're now handling the remand of the Texas  
20 AG, and that they were stretched too thinly to handle this  
21 matter in the -- in a lead role. Although they will  
22 continue to be actively involved, but at the pace that the  
23 Court made very clear it intended to go, and, at that point,  
24 Google looked to add counsel here. They knew that in Paul,  
25 Weiss they had very experienced trial counsel who had

1 experience both in this district and experience with  
2 antitrust trials, and they brought them in to be lead  
3 counsel going forward.

4           You're absolutely right. They entered their  
5 appearance in May, but since then, they have been very  
6 actively involved. As Elizabeth McCabe -- who's here, the  
7 deputy general counsel of Paul, Weiss -- made clear in her  
8 declaration, they've already contributed more than  
9 10,000 hours of work to this matter. They're playing a lead  
10 role on strategy, they're playing a very significant role on  
11 deposition.

12           So that's how that all happened as a factual  
13 matter. Once it became clear that this was going to go as a  
14 standalone case at a high rate of speed, they were brought  
15 in to take the lead on that.

16           THE COURT: All right. Now, the only other  
17 question I think I have for you at this point is, there  
18 apparently is one attorney working on this litigation who  
19 had done something like 35 or 36 hours of work when your  
20 firm was representing those two entities.

21           For some reason, you haven't identified this  
22 person. Is there a reason why the name is not on the record  
23 so everybody would know?

24           MR. SHAPIRO: I'm happy to provide the name if the  
25 Court would like me to. The attorney is Dan Crane.

1 THE COURT: Can you spell the last name?

2 MR. SHAPIRO: C-R-A-N-E.

3 And, actually, it's helpful to identify him  
4 because it makes clear his role.

5 Dan Crane is a full-time law professor at the  
6 University of Michigan. He is also a lawyer at Paul, Weiss.  
7 He was brought in on the earlier White Paper to provide  
8 high-level legal strategy, legal advice. He wasn't  
9 client-facing, he wasn't getting their confidences. He's a  
10 big-picture, big-think guy. So that's what he had done  
11 before.

12 He is now, as -- once this became an issue, in an  
13 abundance of caution, he's been screened from this matter  
14 entirely, so he is not, at present, at all part of the Paul,  
15 Weiss team representing Google.

16 THE COURT: Were there any paralegals or support  
17 staff that were significantly involved in assisting  
18 Mr. Kanter and Mr. Kressin when they were working on behalf  
19 of these two entities? Did anybody check that out?

20 MS. MCCABE: Yes, Your Honor.

21 THE COURT: Come up to the lectern, ma'am.

22 MR. SHAPIRO: Ms. McCabe, who is the deputy  
23 general counsel.

24 THE COURT: Yes.

25 MS. MCCABE: Hi, Your Honor.

1 THE COURT: Good morning.

2 MS. MCCABE: Yes. There certainly were paralegals  
3 assisting Mr. Kanter while he was at Paul, Weiss. We did  
4 look at whether there was any overlap in those support staff  
5 and the support staff working on the Google matter. There's  
6 one paralegal who billed I think an hour to the prior matter  
7 who was working on the Google matter.

8 THE COURT: All right. All right. Thank you.

9 MR. SHAPIRO: Anything further, Your Honor?

10 THE COURT: I don't think so.

11 MR. SHAPIRO: Thank you.

12 THE COURT: Mr. Kressin, is there anything you  
13 want to add to your position?

14 MR. KRESSIN: Yes, Your Honor. Thank you.

15 There's a few things I'd like to address. First  
16 regarding your first question about whether NMA or Yelp have  
17 produced anything in this case that relates to Paul, Weiss  
18 that will be used.

19 The main point of our -- one of the key points of  
20 our motion is that we didn't have to produce it in order for  
21 Google to get access to it. They didn't fight us very hard  
22 to try to get access to those Paul, Weiss communications.  
23 One possibility being that they already have access because  
24 they could simply ask their counsel at Paul, Weiss to either  
25 turn that information over to them or to use that

1 information for their own purposes. So they didn't need  
2 discovery to get at our documents. So that was one of the  
3 issues. It's not about what we've turned over in discovery.

4 Second, although they have argued that Yelp and  
5 News/Media Alliance have not yet been identified as  
6 potential witnesses in this case or been deposed, Google did  
7 say, during oral arguments relating to the partial judgment  
8 motion, that they wanted these documents to challenge the  
9 credibility of Yelp and News/Media Alliance.

10 And I'll also point out that News/Media Alliance,  
11 once again, is a trade association that has many different  
12 members who are involved in its activities and would appear  
13 in those communications, and some of those members have  
14 been -- or are on that witness list, and some of those  
15 members have -- were also clients of Paul, Weiss during that  
16 same time.

17 Third, the -- counsel for Paul, Weiss raised this  
18 point that after the fact, they raised screens to screen out  
19 at least Dan Crane and maybe some paralegals. I'll point  
20 out that under Virginia law, screens don't cure a conflict  
21 of this sort, so that should be ignored.

22 But the final point I'll make is that simply  
23 looking at the invoices to figure out which attorneys or  
24 paralegals or support staff billed on a particular matter  
25 does not give you full insight into the scope of the work

1 that was done. It's quite common not to include all of the  
2 time that attorneys work on a matter on invoices that  
3 eventually go to the client. And even for attorneys who  
4 weren't directly working on the matter, it was common  
5 practice every week -- or almost every week, there would be  
6 weekly breakfasts where we talked about the work we were  
7 doing for our clients, we talked about the legal theories  
8 that we were planning to bring and advocacy that we were  
9 doing. These were widely attended with, at least the  
10 Washington, D.C. antitrust office, and attorneys there would  
11 have very easily gained information about the positions that  
12 Yelp and News/Media Alliance and News/Media Alliance's  
13 members were taking with respect to ad tech.

14 THE COURT: All right.

15 MR. SHAPIRO: Your Honor, may I address one point  
16 Mr. Kressin made, Your Honor?

17 THE COURT: Yes, Mr. Shapiro.

18 MR. SHAPIRO: I just like -- the idea that Paul,  
19 Weiss could rifle through their files to find things was  
20 addressed by Ms. McCabe, and Mr. Kressin, frankly, should  
21 know better. In the declaration of Ms. McCabe at  
22 paragraphs 19 and 20, she points out that she confirmed,  
23 through consultation with the firm's electronic information  
24 governance department -- which maintains official records of  
25 Paul, Weiss -- that none of the lawyers who billed time to

1 the firm's representation of Google in this action had  
2 accessed any Yelp or NMA documents stored on Paul, Weiss's  
3 document management system. And that, in paragraph 20, that  
4 they could not because they had established screens to  
5 prevent such access.

6 So that's, frankly, with all respect, a red  
7 herring.

8 THE COURT: Well, I'm going to adhere to my normal  
9 practice of ruling from the bench as much as possible,  
10 although we'll follow this up with a written opinion with a  
11 few more details.

12 But I'm satisfied, both on the basis of the  
13 pleadings, which we've gone through in chambers, as well as  
14 the oral arguments today, that the plaintiff has not  
15 satisfied -- I'm sorry -- well, I'm going to call you the  
16 plaintiff because you've got -- the movant has not met the  
17 standards that are necessary to permit the Court to go ahead  
18 and disqualify a law firm from representation.

19 Specifically, I'm not finding that Google is --  
20 the issues in this case do not result in a finding that  
21 there's a materially adverse situation going on here. The  
22 fact that the two nonparties could be, down the road,  
23 affected by the resolution of this case, is not enough to  
24 create, you know, the materiality that's required to show  
25 that it's an adverse situation here. If this kind of

1 general approach were taken, it would probably disqualify  
2 most large firms from an awful lot of litigation, and that's  
3 just not what the ethical rules require.

4 I also do not find that this case is substantially  
5 related to the nature of the representation that did go on  
6 for these two entities, because the ad technology is quite  
7 different from the technology that's involved in the  
8 *Research* case, which is the one that's going on right now in  
9 the District of Columbia. And so also, that factor is not  
10 met.

11 And, lastly, I just can't find, from either the  
12 papers or even from the discussion here, that there's actual  
13 prejudice to either of these two entities from allowing  
14 Paul, Weiss to continue.

15 Now, having said that, however, I am going to put  
16 in my order that Paul, Weiss will not be permitted, and  
17 Google will not be permitted, to present any evidence  
18 whatsoever involving Yelp or the other entity. All right.  
19 It's irrelevant to this case. I mean, the case is whether  
20 or not there's anticompetitive conduct going on. This whole  
21 issue -- this red herring that I mentioned before about, you  
22 know, motivation of Mr. Kanter or the Department of Justice  
23 in bringing this litigation, I really am going to warn  
24 counsel right now. Mr. Shapiro, I don't think you've been  
25 before us before, but it looks look to me like you



1 understand how cases are tried, and, around here, there will  
2 be time limits, and so you'll need to use your time wisely  
3 in representing Google. This is a red herring, in my view.  
4 Our juries are smart, they pick up on that sort of thing as  
5 well. So I don't see any way in which there's going to be  
6 any prejudice to Yelp or the other entity in terms of  
7 allowing Paul, Weiss to continue.

8           Nevertheless, as an abundance of caution, my order  
9 will also make it crystal clear that Mr. Crane cannot have  
10 anything to do with this case. All right. And I will put  
11 Paul, Weiss also under a constant admonition that it must  
12 carefully make sure that if, at any point, you find that  
13 something has leaked over that Chinese wall that has been  
14 put in place, that you must immediately stop, all right, and  
15 advise the Court that you've discovered there is a little  
16 bit of leakage so that we can get it on the record and  
17 address it.

18           Is that clear, Mr. Shapiro?

19           MR. SHAPIRO: Yes, Your Honor.

20           THE COURT: All right. So the motion is denied.  
21 We'll recess court for the day. Thank you.

22           MR. SHAPIRO: Thank you, Your Honor.

23           (Proceedings adjourned at 10:14 a.m.)

24           -----  
25 I certify that the foregoing is a true and accurate

transcription of my stenographic notes.

Stephanie Austin

Stephanie M. Austin, RPR, CRR